RECENT DECISIONS.

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ADMIRALTY—LIMITATION OF LIABILITY—PRIVITY AND KNOWLEDGE.—A manager of a corporation inspected a vessel and failed to see a fault apparent to an ordinarily careful man. The vessel was lost. The corporation attempted to limit its liability. *Held,* the corporation having "privity and knowledge" must respond in full. *The Oregon etc. Co.* v. *The Portland etc. S. S. Co.* (1908) 162 Fed. 912.

The rule of the general maritime law that the owner is liable for the acts of his agents arising *ex delicto,* only to the extent of the vessel's value, *The Rebecca* (1831) 1 Ware 187, was not countenanced in this country, *N. J. etc. Nav. Co.* v. *Bank* (1848) 6 How. 344, 435; *The Amiable Nancy* (1817) 11 Paine 111, 118, due to the tendency to follow the English principles. See 8 COLUMBIA LAW REVIEW 648. This was remedied by Federal statutes, limiting liability for torts and later for contracts. Rev. St. 4282-4287. The courts have given these statutes, passed to promote the interests of commerce, a broad interpretation in the light of the general maritime law. *Butler* v. *Boston S. S. Co.* (1888) 130 U. S. 537. The owner is only deprived of this limitation when he has "privity or knowledge." To constitute such privity the owner must himself participate in some fault or negligence causing the loss. *Lord* v. *Goodall etc. Co.* (1877) Fed. Cas. 8,506. If, however, due care is exercised in the selection of an agent, knowledge of any negligence will not be imputed. *Quinlan* v. *Pew* (1893) 56 Fed. 111; *The Annie Faxton* (1896) 75 Fed. 312. If the owner be a corporation, though the above rule applies as to ordinary agents, *Craig* v. *Con. Ins. Co.* (1891) 141 U. S. 638; cf. *La Bourgogne* (1908) 210 U. S. 95, the knowledge of managing officers deprives it of the limitation. *Parsons* v. *Empire Trans. Co.* (1901) 111 Fed. 202. The principal case accordingly is sound.

BANKS AND BANKING—SAVINGS BANK TRUSTS IN NEW YORK.—A father deposited money in a savings bank in his own name, as trustee for his son. The latter, though informed of the deposit, was told that his father desired it left in the bank so that he could give it personal supervision. *Held,* the gift was intended to take effect in possession at the depositor's death and the funds were subject to a transfer tax. *In re Pierce's Estate* (1908) 112 N. Y. Supp. 594. See NOTES, p. 70.

BREACH OF MARRIAGE PROMISE—SURVIVAL OF ACTION.—A statute provided that liability for damages, in cases of executory contracts should run from the time of default. Plaintiff sued the estate of the promisor for breach of a promise of marriage, default having been made in the lifetime of the deceased. *Held,* the default made the obligation of the deceased one to respond in damages, which obligation survived. *Johnson* v. *Levy* (La. 1908) 47 So. 422, affirming 118 La. 447.

The test of the survival of an action is not whether it be in contract or in tort but whether the damages sought to be recovered are for a personal or non-personal injury. *Stebbins* v. *Palmer* (Mass. 1822) 1 Pick. 71. Thus, actions for personal injuries based upon the contract of carriage do not survive; *Webber* v. *The St. Paul City Ry. Co.* (1899) 97 Fed. 140; nor do actions for the malpractice of a physician. *Jenkins* v. *French* (1879) 58 N. H. 532. An action for breach of promise of marriage is universally held at common law to die with the promisor unless special damage, that is damage to property, is shown. The action is so essentially personal that no case of special damage has, as far as can be determined, ever arisen. It is doubtful if such damages could ever arise unless, in exchange for the plaintiff's promise, the defendant made a promise

affecting the property of the other party. *Finley* v. *Churney* (1888) 20 Q. B. D. 494; *Wade* v. *Kalbfleisch* (1874) 52 N. Y. 282. The reasoning of the principal case judged by the common law is unsound. Thus it has been held that if after an award by arbitrator, the promisor died, pending appeal, the action abated. *Lattimore* v. *Simmons* (1825) 13 S. & R. 183.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—POLICE POWER.—The defendant was indicted for an alleged violation on October 30th, 1907, of a State law, effective June 14th, 1907, which regulated the hours of service of telegraph operators and train dispatchers. Congress had passed a similar but less stringent law on March 4th, 1907, to take effect March 4th, 1908. *Held,* the indictment must be quashed, the State law never having become operative. *State* v. *Mo. Pac. Ry. Co.* (Mo. 1908) 111 S. W. 500. See NOTES, p. 66.

CONTRACTS—STATUTE OF FRAUDS—ORAL AGREEMENT AS CONSIDERATION.—A statute provided that a parole contract fixing the compensation of land brokers should be void. A dispute arising as to the amount due the plaintiff, a broker, under an oral agreement, the defendant gave a promissory note in settlement. *Held,* the plaintiff might recover on the note. *Mohr* v. *Rickdauer* (Neb. 1908) 117 N. W. 950.

Strictly construing the statute in question, the Nebraska courts have even denied a recovery on a *quantum meruit* for services such as were rendered in the principal case. *Blair* v. *Austin* (1904) 71 Neb. 401; *Barney* v. *Lasbury* (1906) 76 Neb. 701, a remedy usually granted under the ordinary statute. *Bentley* v. *Smith* (1907) 3 Ga. App. 242. It is surprising therefore that the principal case holds the contract merely voidable. This interpretation, correct in reference to the orthodox statute of frauds, is opposed to the interpretation of similar statutes in other jurisdictions, where the contracts, specifically stipulated to be "void," have been held nullities. *Brandeis* v. *Neustadtl* (1860) 13 Wis. 158; *Pierce* v. *Clark* (1898) 71 Minn. 114. If the parole contract is void, the principal case is incorrect in holding it consideration for the note. *Hooker* v. *Knab* (1870) 26 Wis. 511. If it were merely voidable, this court might well find consideration, since it holds past services done at the request of the promisor sufficient to support a subsequent promise. *Stuht* v. *Sweesy* (1896) 48 Neb. 767. Considering the voidable parole contract as a liquidated obligation, i. e. a debt, the majority of courts would support the principal case in holding it good consideration for the note, though barred by the statute. *Rogers* v. *Stevenson (1870) 16 Minn. 68. Cf. Ilsley* v. *Jewett (Mass. 1841) 3 Metc. 439; Lonsdale* v. *Brown (1821) 15 Fed. Cas. 8493.* There would be no objection to the principal case because of the absence of consideration for the plaintiff's promise to accept less than the whole debt, since the defendant assumes an obligation of a new sort. *Jaffray* v. *Davis* (1891) 124 N. Y. 164.

CORPORATIONS—CRIMINAL LAW—MANSLAUGHTER.—On the allegation that a death was caused by its culpable negligence the corporation was indicted for manslaughter in the second degree. *Held,* on demurrer, the indictment did not lie. *People* v. *Rochester Ry. & Light Co.* (1908) 112 N. Y. Supp. 362.

It was formerly doubted that a corporation could be held *criminaliter. Anon.* (1702) 12 Mod. 559. Such liability became well established, first in cases of nonfeasance, *S. & B. Turnpike Road Co.* v. *People* (N. Y. 1836) 15 Wend. 267; *R.* v. *Birmingham & Gloucester Ry. Co.* (1842) 3 Q. B. 223, and later in cases of misfeasance. *R.* v. *Great North of Eng. Ry. Co.* (1846) 9 Q. B. 315; *State* v. *M. & E. R. R. Co.* (N. J. 1852) 3 Zab. 360. Though the statute read "every person," etc., corporations are held liable for statutory offenses, e. g., usury, sabbath-breaking, permitting gambling, maintaining disorderly house. *State* v. *Security Bank* (1892) 2 S. D. 538; *State* v. *B. & O. R. R.* (1879) 15 W. Va. 362; *Com.* v. *Pulaski Co. A. & M. Ass'n* (1891) 92 Ky. 197; *State* v. *Passaic Agric. Soc.*

(1892) 54 N. J. L. 260. The rule is said not to extend to offenses which "derive their character from the corrupted mind of the person committing them." *R.* v. *Great North of Eng. Ry. Co., supra.* However, the lack of mind capable of intent is no longer regarded as a bar to corporate liability for such torts as conspiracy, deceit, or malicious libel. *Buffalo Lubricating Oil Co.* v. *Standard Oil Co.* (1887) 106 N. Y. 669; *Erie City Iron Works* v. *Barber & Co.* (1884) 106 Pa. 125; *Life Ins. Co.* v. *Brown* [1904] A. C. 423 at 426. There should be no more difficulty in imputing intent to a corporation in a criminal proceeding than in a civil. *Telegram Newspaper Co.* v. *Commonwealth* (1898) 172 Mass. 294. The principal case sustains the demurrer because by the Penal Code § 179 manslaughter can be committed only by human beings. Its reasoning, however, is in accord with a modern tendency to extend corporate liability. Thus a corporation was held not indictable for manslaughter in *R.* v. *Great Western Laundry Co.* (1900) 13 Manitoba 66, but principally because there was no appropriate punishment, while a corporation was successfully indicted for criminal negligence resulting in death, in *Union Colliery* v. *H. M. The Queen* (1900) 31 Can. Sup. Ct. 81, where all the elements of manslaughter were present. If a corporaton may be indicted for criminal negligence, logically it should be indictable for manslaughter by negligence.

CORPORATIONS—DIRECTORS—SUIT BY STOCKHOLDER.—The directors of a corporation issued proxy forms with circulars urging changes in by-laws, paying for such documents with corporate funds and refusing to circulate the opposing arguments of a dissentient minority. *Held,* a suit by a stockholder to enjoin action under such by-laws would not lie. *Campbell* v. *Australian Mutual Provident Society et al.* (1908) 77 L. J. Rep. 117.

Suits for wrongs done a corporation should *prima facie* be brought in the name of a corporation. *Foss* v. *Harbottle* (1843) 2 Hare 461. When, however, the corporation is controlled by a majority who will not sue, a suit will lie in the name of a stockholder; *Burland* v. *Earle* L. R. [1902] A. C. 83; provided that the governing body are doing or contemplating acts *ultra vires,* or so illegal, fraudulent, or oppressive, as to amount to a breach of trust. *Hawes* v. *Oakland* (1881) 104 U. S. 450; 8 COLUMBIA LAW REVIEW 313. If *intra vires* such acts will be enjoined, only if they appear to have been done in defiance of the interests of the corporation, thus raising an inference of dishonesty. *Gamble* v. *Queens Co. Water Co.* (1890) 123 N. Y. 91. In the principal case the directors were acting *intra vires* for what they believed to be the best interests of the corporation. There was no proof of improper purpose. Bare refusal to circulate complainant's views was not necessarily proof of dishonest intent, and though arbitrary is not actionable. Thus, where a chairman acting in collusion with directors declared a motion carried and refused to poll the meeting, as required by the company's articles, the court refused to interfere. *Macdougall* v. *Gardiner* (1875) 1 Ch. D. 13.

CORPORATIONS—LIABILITY OF STOCKHOLDERS—NECESSITY OF FIRST SUING BANKRUPT CORPORATION.—Action under § 64 of Stock Corporation Law. *Held,* though the corporation had been discharged in bankruptcy, failure to first sue it is fatal, under § 65, to a recovery against the stockholders. *Firestone etc. Co.* v. *Agnew et al.* (App. Div. 1908) 112 N. Y. Supp. 907.

The statutes making stockholders secondarily liable for corporation debts are narrowly construed. *Chase* v. *Lord* (1879) 77 N. Y. 1. Recovery of judgment against the corporation and return of execution unsatisfied is a condition precedent to the right to hold the stockholders. *Cambridge etc. Co.* v. *Somerville etc. Co.* (Mass. 1862) 4 Allen. 239. There are two views as to when strict compliance with this condition may be dispensed with. It is generally excused where impossible: as where the corporation has been dissolved, *State Sav. Ass'n etc.* v. *Kellogg et al.* (1873) 52 Mo. 583; or where the creditor is prevented by injunction, or by statute, *Hunting* v. *Blum* (1894) 143 N. Y. 511; *Shellington* v. *Howland* (1873) 53 N. Y. 371, from suing the corporation. New York goes no further than this.

United Glass Co. v. *Vary* (1897) 152 N. Y. 121. Other states have dispensed with the condition where compliance would be futile: as where the corporation is insolvent, or where a receiver has been appointed. *Hodges et al.* v. *Silver Hill etc. Co.* (1881) 9 Ore. 200; *Paine* v. *Stewart* (1866) 33 Conn. 516, 531. If, in the principal case, the effect of the discharge in bankruptcy had been to extinguish the debt as to the corporation, suit against it might have been dispensed with as impossible. But discharge in bankruptcy is a mere personal privilege. It does not extinguish the debt, *In re Burton* (1886) 29 Fed. 637, nor does it prevent suit upon it against the corporation for the purpose of establishing the secondary liability of stockholders. *In re Marshall Paper Co.* (1900) 102 Fed. 872; *Chamberlain* v. *Huguenot Mfg. Co.* (1875) 118 Mass. 532; see *King* v. *Block Amusement Co.* (N. Y. 1908) 126 App. Div. 48. The principal case, though perhaps questionable under the second view, *supra,* is sound in New York.

COURTS—STATE AND FEDERAL—INTERFERENCE BY INJUNCTION.—By suing in a state court, the plaintiff sought to enjoin the defendant from executing a judgment secured in a Federal Circuit Court. *Held,* for the defendant. *Smith* v. *Reed* (N. J. 1908) 70 Atl. 961.

Its decree operating strictly *in personam,* logically equity may restrain a person of whom it has acquired jurisdiction, from acting unconscionably in a foreign jurisdiction, whether the act be a tort, *Great Falls Mfg. Co.* v. *Worster* (1851) 23 N. H. 462, or the institution or prosecution of legal proceedings. *Portarlington* v. *Soulby* (1834) 3 M. & A. 104; *Sandage* v. *Studabaker* (1895) 142 Ind. 148. Equity will not act, however, where the enforcement of its decree necessitates extra-jurisdictional acts by its ministers, *Munson* v. *Tyron* (1867) 6 Phila. 395; *Carteret* v. *Petty* (1675) 2 Swan. 223, and frequently refuses to act, in a particular case, on grounds of expediency. *Jones* v. *Geddes* (1846) 1 Phil. 724. But, more often, if a foreign court that has first acquired jurisdiction be one of concurrent or co-ordinate authority, an injunction against one of the parties will be refused on grounds of comity. *Mead* v. *Merritt* (N. Y. 1831) 2 Paige 402. This principle has been recognized in Federal Courts, *Peck* v. *Jenness* (U. S. 1849) 7 How. 612, where an inability to interfere with State courts, except in bankruptcy proceedings, has been recognized by statute. U. S. Comp. St. (1901) § 720. Nor will the State courts enjoin the prosecution of proceedings pending in Federal tribunals, for like reasons. *Central National Bank* v. *Stevens* (1897) 169 U. S. 432; *Riggs* v. *Johnson County* (1876) 6 Wall. 166. However, a Federal court will stay execution on a judgment fraudulently obtained, *Marshall* v. *Holmes* (1891) 141 U. S. 589; *Perry* v. *Johnson* (1899) 95 Fed. 322, and the reciprocal of this would seem to follow. The principal case not involving fraud is correctly decided.

CRIMINAL LAW—GRAND JURY—WITNESS' PRIVILEGE.—In an investigation by a grand jury to find indictments against the defendants they were subpœnaed and sworn as witnesses. They sought to quash the resulting indictments, because, though they refused to give evidence, their constitutional right not to be witnesses against themselves had been violated. *Held,* the indictments were valid. *United States* v. *Price et al.* (1908) 163 Fed. 904.

The general privilege of witness and party is defined by the Fifth Amendment of the Constitution; the party's privilege, by such enactments as the United States Statute which stipulates that a person charged with a crime shall be a competent witness at his own request but not otherwise. The distinction between the privilege of party and witness is that it is improper to attempt to swear a party as a witness and coerce him to a claim of privilege, *United States* v. *Kimball* (1902) 117 Fed. 156, 160; *Wolfson* v. *United States* (1900) 101 Fed. 430, 436, while the witness' privilege is not a prohibition of inquiry but merely an option of refusal; *United States* v. *Kimball, supra; State* v. *Duncan* (1905) 78 Vt. 364; 3 Wigmore, Evidence, § 2268; and swearing the person as witness is a necessary preliminary to his claim of privilege. *In re Scott* (1899) 95 Fed. 815. Although a grand

jury hearing is a "criminal case" in the sense that a person before it is entitled to a witness' privilege, *Counselman* v. *Hitchcock* (1892) 142 U. S. 547, it is no part of the criminal proceedings, *Post* v. *United States* (1896) 161 U. S. 583; *United States* v. *Reed* (1852) 27 Fed. Cas. 16134, and before indictment found and some process directed against the witness, he is not a party. *United States* v. *Brown* (1871) 24 Fed. Cas. 14671. The principal case seems sound, therefore, in denying the defendants the party's privilege, and is in accordance with the well founded opposition to an undue extension of privilege. Although there may be some justification in a preliminary examination for granting the party's privilege to a person under arrest accused of crime, as was done in *Boone* v. *People* (1894) 148 Ill. 440; *People* v. *Singer* (1886) 5 N. Y. Crim. Rep. 1; *People* v. *Mondon* (1896) 103 N. Y. 211, the later New York case of *People* v. *Gillette* (1908) 111 N. Y. Supp. 133, which grants it under facts similar to the principal case, is not to be supported.

DAMAGES—PERSONAL INJURY—MITIGATION OF DAMAGES.—Through the defendant's negligence the plaintiff was injured and a miscarriage resulted. *Held,* in awarding damages, the pain to be suffered in the natural child-birth should not be deducted from the pain of miscarriage. *Morris* v. *St. Paul etc. Co.* (Minn. 1908) 117 N. W. 500.

The decision of the court accords with the authority in point; *Bovee* v. *Town of Danville* (1880) 53 Vt. 183; *West* v. *St. Louis etc. Co.* (1905) 187 Mo. 351; accepting the principle that the tort-feasor is responsible for the consequences of his act though these be aggravated by the peculiar condition of the plaintiff. 8 COLUMBIA LAW REVIEW 656. The theory of mitigation rejected in the principal case is suggested in Joyce, Damages §§ 185-186, and receives support from *Hawkins* v. *Front etc. Co.* (1892) 3 Wash. 592. This theory, aside from the difficulty of estimating a proper deduction, might well be adopted. Thus, if a person enduring pain from a previously sprained ankle again suffers a sprain through defendant's negligence, damages are awarded only for the increased suffering, *Schwingschlegl* v. *City of Monroe* (1897) 113 Mich. 683, and also pain resultant from an injury caused by defendant's negligence will be balanced against pain naturally to be expected from a present malady or affection. *Brown* v. *Hannibal etc. Co.* (1877) 66 Mo. 588. These cases, it is submitted, are not inconsistent with the rule holding a wrongdoer for all the consequences of his act, because the pain occasioned by an existing disorder is not attributable to the defendant and therefore should be deducted from the total suffering in awarding damages. In the principal case, the injury complained of necessarily prevented the suffering which would be expected from the natural child-birth, and this foreseeable pain, if measurable, should be considered in rendering a verdict. But such pain is entirely too speculative and the result of the principal case must therefore be supported.

EQUITY—EQUITABLE CONVERSION—POWER OF A TESTATOR TO CHANGE THE NATURE OF PROPERTY.—A testator, after devising lands to his children in tail with cross remainders, bequeathed his residuary personal estate to be applied according to the provisions of the Settled Land Act. That act provided for the devolution of certain moneys as though they were land, but permitted investment in securities. A daughter died without having executed a disentailing assurance. *Held,* her interest in the personal estate was absolute and passed to her representatives. *In re Walker* (1908) L. J. 77 Ch. Div. 755.

A testator has the power to make a constructive change in the nature of property. He "may make land money, or money land" by an imperative direction that the land shall be sold or the money laid out in land. *Fletcher* v. *Ashburner* (1779) 1 Bro. C. C. 497. The principle supporting this doctrine is that equity, looking at the substance and not the form, considers things directed or agreed to be done as actually performed. *Craig* v. *Leslie* (1818) 3 Wheat. 564. Once constructively converted, all the consequences follow and the property passes as it would in the form ultimately

intended, *Marsh* v. *Wheeler* (N. Y. 1833) 2 Edw. Ch. 156, though the testator's control is limited by the right of election in the parties interested to take the property in either form. *Burr* v. *Sim* (Pa. 1836) 1 Whart. 252. But a testator cannot control the devolution of property by a mere declaration that it shall be considered as converted. There must be an imperative trust, for it is not the declaration but the duty to convert which creates the equitable change. *Att'y Gen'l* v. *Mangles* (1839) 5 M. & W. 128. Therefore the discretion of the trustees in the principal case to invest in securities was fatal to a conversion.

EVIDENCE—ADMISSION OF CO-CONSPIRATORS.—In an action to cancel certain conveyances on the ground of fraud, the plaintiff, having established a conspiracy among the defendants, attempted to introduce a deposition made by one of the conspirators at a former trial. *Held*, the deposition was admissible against all the defendants. *Hellman* v. *Somerville* (Mo. 1908) 111 S. W. 30. See NOTES, p. 61.

FIXTURES—EFFECT OF RENEWAL LEASE ON THE RIGHT TO REMOVE.—A tenant from year to year having erected buildings without any foundations took a renewal lease without reserving the right to remove. *Held*, the right of removal survived. *Ogden* v. *Harrison* (Neb. 1908) 117 N. W. 714.

Erections by a tenant during his leasehold are regarded as real property which the tenant has a license to remove. This license does not survive a surrender of the tenancy since any entry during a subsequent lessee's occupancy would lead to confusion, and public policy forbids it. If a tenant takes a new lease, by the weight of authority, his surrender of the prior tenancy deprives him of the right of removal unless reserved. *Sanitary District of Chicago* v. *Cook* (1897) 169 Ill. 184; *Marks* v. *Ryan* (1883) 63 Cal. 107; *Wattriss* v. *Bank* (1878) 124 Mass. 571. Some courts, however, looking to the reason underlying the forfeiture of trade fixtures not removed during the term, would agree in refusing to apply the rule to the facts of the principal case. *Kerr* v. *Kingsbury* (1878) 39 Mich. 150; *Rady* v. *McCurdy* (1904) 209 Pa. St. 306; *Second Nat'l Bank* v. *Merrill* (1887) 69 Wis. 501. The apparent injustice resulting from the application of the orthodox doctrine has led to many over-nice distinctions. *Bernheimer* v. *Adams* (1902) 70 App. Div. 114; *Bergh* v. *Herring Hall Marvin Safe Co.* (1905) 136 Fed. 368; *Hedderich* v. *Smith* (1885) 103 Ind. 203. The principal case evinces a growing tendency to depart from the established rule.

GUARDIAN AND WARD—INFANCY—JUDGMENTS IN REM.—In a previous suit the court, determining A to be of age, discharged his guardian. A later conveyed realty to the defendants. Plaintiffs, his collateral heirs, attacked the conveyances, claiming A to have still been an infant. *Held*, Rudkin, J. dissenting, the previous adjudication was conclusive against the plaintiffs. *Meeker* v. *Mettler* (Wash. 1908) 97 Pac. 507.

Judgments *in rem* are conclusive as to all persons and in all actions. Determination of the status of a subject matter are judgments *in rem*. Freeman, Judgments (3rd Ed.) § 606; *Woodruff* v. *Taylor* (1847) 20 Vt. 65, 73. Thus the following have been considered adjudications *in rem*: probate of wills, [*State* v. *McGlynn* (1862) 20 Cal. 234, 270], record of admission of aliens to citizenship, [*McCarthy* v. *Marsh* (1851) 5 N. Y. 263, 279], order for removal of paupers, finding their legal settlement, [*West Buffalo* v. *Walker Township* (1848) 8 Pa. St. 177, 180; *Cabot* v. *Washington* (1868) 41 Vt. 168, 171; *Rex* v. *Inhabitants of Bentley* (1757) Burrows Supp. Cas. 425; but see *Bethlehem* v. *Watertown* (1879) 47 Conn. 237, 245], decree establishing pedigree, [*Ennis v. Smith* (1852) 14 How. 400, 430], certificate of discharge in bankruptcy, [*Michaels* v. *Post* (1874) 21 Wall. 398, 428], decree of divorce. [*Hood* v. *Hood* (1872) 110 Mass. 463, 465]. Findings of inquisitions of lunacy, however, are held only *prima facie* evidence of the incapacity of the grantor during the time overreached

by them. *Den d. Aber* v. *Clark* (1828) 10 N. J. L. 227, 258; *Hughes* v. *Jones* (1889) 116 N. Y. 67, 73. An order adjudging a person of age determines his status, and would seem by analogy to be *in rem*. In this view the majority opinion in the principal case is correct. If the previous action be regarded as *in personam*, the plaintiffs should not have been barred, since estoppels by judgment to be effective must be mutual, and the defendants, not being parties to the previous suit, and not privies to the guardian, would not have been bound had the order in the previous suit been reversed. Freeman, Judgments (3rd Ed.) §§ 154, 159.

HUSBAND AND WIFE—SEPARATION OF PARTIES IN EQUAL GUILT.—A wife brought an action for separation and support under § 1762 of N. Y. Code of Civ. Pro. *Held*, Cullen C. J. dissenting, the defense of adultery of the wife is sufficient under § 1765, although previously an absolute divorce was refused on the ground that both had been guilty of single acts of adultery. *Hawkins* v. *Hawkins* (App. Div. 1908) N. Y. Law Jour. Vol. 40, No. 53.

To make out a defense to an action for separation under § 1765, N. Y. Code of Civ. Pro., the plaintiff's misconduct need not be such as would base an action for divorce. *Deisler* v. *Deisler* (1901) 59 App. Div. 207; *Palmer* v. *Palmer* (1865) 29 How. Prac. 390. The relative conduct of the parties toward one another is of prime importance in determining misconduct, *Powers* v. *Powers* (1903) 84 App. Div. 588, and while adultery may constitute such misconduct, *Doe* v. *Roe* (1880) 23 Hun 19, the conduct of the husband should also be considered. On the other hand, interpreting the principle of recrimination literally, the conduct of the husband is immaterial, for although both are guilty of single acts of adultery the husband is justified in abandoning the wife, since the wife's guilt bars her relief. *Hope* v. *Hope* (1858) 1 S. & T. 94; *Otway* v. *Otway* (1888) L. R. 13 P. D. 141. The New York decisions, however, are more in accord with the canon law as recognized in *Seaver* v. *Seaver* (1846) 2. S. & T. 665, which appears preferable. 1 Bishop, Mar. Div. & Sep. § 1764. An absolute divorce having been denied because of mutual guilt, the marital obligations remain unimpaired, and judging from the relative conduct of the parties the husband's abandonment is not justified. While, therefore, the principal case is in accord with decided authority, it is to be regretted, since that authority is not controlling, and the decisions in New York, *supra*, furnish a theory which would have avoided the inequitable result reached; for, failing in this action, the wife has no means of compelling support. *Ramsden* v. *Ramsden* (1883) 91 N. Y. 281.

HUSBAND AND WIFE—WIFE A SURETY FOR HUSBAND—UNDUE INFLUENCE.—The defendant bank had advanced money to the plaintiff's husband and held securities of the latter covering the indebtedness. To obtain further credit for her husband, the plaintiff assigned certain property of her own to the defendant. There was no element of fraud or coercion. The plaintiff sought to have the transfer set aside on the ground of lack of independent advice. *Held*, by a divided court, the transfer was binding. *Stuart* v. *Bank of Montreal* (1908) 12 Ontario Weekly Rep. 958.

When two parties in confidential relation, such as husband and wife, negotiate with one another, undue influence is presumed, and to make the transaction valid the party deriving the benefit must rebut this presumption. 2 Pomeroy Eq. Juris. 957; *Shea's Appeal* (1888) 121 Pa. 302. When, as in the principal case, the wife acts for the benefit of her husband with a third party who has knowledge of the relationship, the third party is included in the confidential relationship. *Archer* v. *Hudson* (1844) 7 Beav. 551; *Holt* v. *Agnew* (1880) 67 Ala. 360. Although the English courts have held it essential, in cases of gift, where undue influence is presumed, to show independent advice to rebut the presumption—*Rhodes* v. *Bates* (1865) 1 Ch. App. 252; *Allcard* v. *Skinner* (1887) 36 Ch. Div. 145, at 158, 181, 190; *Powell* v. *Powell* (1900) 1 Ch. 243—the general principle is that the

strength of the presumption depends largely upon the relationship and the circumstances; and in the case of a contract between husband and wife independent advice is unnecessary, and the presumption is rebutted by merely showing good faith and independent consent by the wife. *Turner* v. *Turner* (1869) 44 Mo. 535; *Holt* v. *Agnew, supra; De Ronge* v. *Elliott* (1873) 23 N. J. Eq. 486; *Green* v. *Green* (1894) 42 Neb. 634. And since the passage of the Married Woman's Property Acts, the presumption is not even invoked in the ordinary case of a married woman acting as surety for her husband. *Smith* v. *Spaulding* (1894) 40 Neb. 339; *Grandy* v. *Campbell* (1898) 78 Mo. App. 502; *Sacramento Lumber Co.* v. *Wagner* (1885) 67 Cal. 293. While the English law is in doubt, the principal case is in accord with the American authorities. The opinion of the dissenting division would practically nullify the Married Woman's Acts.

INJUNCTION—TRESPASS—DISPUTED TITLE—BALANCE OF INJURY.—A city sought to enjoin the defendant, a tunnel company, from further prosecution of work on terminals under two tracts of land, to which plaintiff and defendant claimed title. Under one tract the work was completely finished; under the other but partly. *Held,* the injunction should be refused. *City of Hoboken* v. *Hoboken & M. R. Co.* (N. J. 1908) 70 Atl. 926.

Although a permanent injunction against a trespass will not issue when there is a dispute as to title, *Ches. & Ohio Canal Co.* v. *Young* (1853) 3 Md. 480; *Echelkamp* v. *Schrader* (1870) 45 Mo. 55, by the weight of modern authority where irreparable injury is threatened a temporary injunction may be granted. 1 Pomeroy, Equitable Remedies, § 502. In issuing such injunction the balance of resulting injury is a controlling consideration. *Western Union Tel. Co.* v. *Penn. R. Co.* (1903) 120 Fed. 911; *Morris* v. *Mayor etc. of New York* (1889) 7 N. Y. Supp. 943. Its object is to preserve the *status quo. Mammoth Vein Coal Co's. Appeal* (1867) 54 Pa. St. 183; *Lownsdale* v. *Gray's Harbor Boom Co.* (1902) 117 Fed. 983. Even where there is no dispute as to title, the convenience of the public has sometimes been held a determining factor. *Barney* v. *The City of New York* (1903) 83 N. Y. App. Div. 237. Obviously the convenience of the public is an important element in cases of disputed title, where the balance of injury is always a deciding consideration. *Turner* v. *People's Ferry Co.* (1884) 21 Fed. 90. By weight of recent authority, irreparable injury threatening, an injunction will be given against a defendant in possession, *Erhardt* v. *Boaro* (1884) 113 U. S. 537; 1 Pomeroy, Equitable Remedies, 503, but the plaintiff out of possession must make out a stronger case than if the position of the parties were reversed. *Leininger's Appeal* (1884) 106 Pa. St. 398. In the principal case the injunction would be a serious detriment to the interests of the public without corresponding benefit to the plaintiff, and the decision seems sound.

INSURANCE—STANDARD POLICY—MANUFACTURED GOODS—MEASURE OF DAMAGES.—The plaintiff insured his stock under the standard policy of fire insurance, providing that the measure of recovery "shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality." The plaintiff's stock of manufactured straw hats, ready for delivery, was destroyed by fire, and he could not reproduce them in time for the season market. *Held,* McLaughlin, J. dissenting, the plaintiff was entitled to recover the market value of the hats. *Phillips* v. *Home Ins. Co.* (App. Div. 1908) 40 N. J. Law Jour. 37.

A contract of fire insurance is a contract of indemnity and prior to enacting the statutes promulgating the standard policy which contains the clause quoted, the market value of the goods destroyed was generally taken as the measure of damages. *Eagle Ins. Co.* v. *Lafayette Ins. Co.* (1857) 9 Ind. 443; *Mack & Co.* v. *Lancashire Ins. Co.* (U. S. 1880) 4 Fed. 59; *Grubbs* v. *North Carolina Home Ins. Co.* (1891) 108 N. C. 472. The stipulation of "repair or replacement" was not intended to change the amount of recovery; the insured is still entitled to be completely indemni-

fied. Vance, Insurance 483; *Fisher* v. *Crescent Ins. Co.* (1887) 33 Fed. Rep. 544. Although a few cases have held under the "replacement" clause, in the case of manufactured goods, the insured is entitled to recover only the cost of reproduction—*Standard Sewing Machine Co.* v. *Ins. Co.* (1902) 201 Pa. St. 645—the rule has been generally followed that the insured is entitled to recover the market value of the goods destroyed. *Mitchell* v. *St. Paul German Ins. Co.* (1892) 92 Mich. 594; *Hartford Fire Ins. Co.* v. *Cannon* (1898) 19 Tex. Civ. App. 305; *Fisher* v. *Crescent Ins. Co., supra; Frick* v. *United Firemen's Ins. Co.* (1907) 218 Pa. St. 409. It is submitted, however, that the principal case is unsound in resting its decision on the distinction between *Frick* v. *Ins. Co., supra,* and *Sewing Machine Co.* v. *Ins. Co., supra,* viz., that market value should here be given because the goods were not readily reproducible. Though the courts may allow only the cost of reproduction when the goods are staple, and market value when they are not, it appears that such holdings would be inconsistent.

LANDLORD AND TENANT—APARTMENT HOUSES—INSUFFICIENT HEAT.—The plaintiff occupied an apartment under a lease which contained no stipulation as to heating, although the apartment contained radiators connected with the furnace owned by the landlord. *Held,* no recovery for the inadequate supply of heat. *Jackson* v. *Paterno* (App. Div. 1908) 112 N. Y. Supp. 924.

Although there is no agreement to repair, since a landlord of an apartment house has exclusive control of hallways and stairs, and impliedly invites his tenants to use them, he is liable for damage due to his negligent failure to repair. *Piel* v. *Rheinhardt* (1891) 127 N. Y. 381; *Looney* v. *McLean* (1880) 129 Mass. 33. The same principle is applied to fix his liability in the case of a defective roof, *Toole* v. *Beckett* (1878) 67 Me. 544; *Frank* v. *Simon* (1905) 109 N. Y. App. Div. 38; but see *Krueger* v. *Ferrant* (1882) 22 Minn. 385, and in regard to plumbing under his exclusive control. *Priest* v. *Nichols* (1874) 116 Mass. 401; *Eugene C. Lewis Co.* v. *Met. Realty Co.* (N. Y. 1906) 112 App. Div. 385. Similar principles should apply to the negligent operation of a heating plant owned by the landlord, *Railton* v. *Taylor* (1897) 20 R. I. 279; *Bryant* v. *Carr* (N. Y. 1906) 52 Misc. 155, and it would seem as if the tenant need not supply heat at his own expense to absolve himself from contributory negligence. *Frank* v. *Simon, supra;* Chaplin, L. & T. §§ 489, 491. It is true also that an adequate supply of heat is part of the covenant of quiet enjoyment, but no action will lie upon the covenant unless there has been an eviction. See opinion below (N. Y. 1907) 58 Misc. 201. In refusing recovery the principal case does not deny the latter form of remedy, for there has been no eviction; and while the reasoning of the court repudiates the theory of a recovery in tort, the result reached is sound since there is no proof of damage.

MASTER AND SERVANT—SAFE PLACE TO WORK—FELLOW SERVANT'S NEGLIGENCE.—The lumber skids in defendant's saw mill being defective, A was placed in charge to supply the defect. A was negligent, the skids worked improperly, and the plaintiff was injured. *Held,* the place not being in itself dangerous, was made safe by the employment of A, a fellow servant, for whose negligence the master was not liable. *Carlson* v. *The Weyerhauser Timber Co.* (Wash. 1908) 97 Pac. 501.

The master's duty to provide a safe place to work is non-delegable and a servant acting for him to make a place safe should be regarded not as a fellow servant but as a vice-principal. *New Pittsburg Coal & Coke Co.* v. *Peterson* (1893) 136 Ind. 398, 403; *Northern Pac. R. R. Co.* v. *Herbert* (1885) 116 U. S. 642, 647. The principal case is unsound in not so holding. See *Belleville Stone Co.* v. *Mooney* (1897) 61 N. J. L. 253, 255. Assuming A to be a fellow servant, his negligence would be concurrent with the master's, *Pullman Palace Car Co.* v. *Laack* (1892) 143 Ill. 242, 261; *Asa* v. *Harbach* (Ia. 1908) 117 N. W. 669, 671; *Cone* v. *D. L. & W. R. R. Co.* (1880) 81 N. Y. 206, which should be regarded as an efficient

cause of the injury. *Grand Trunk Ry. Co.* v. *Cummings* (1882) 106 U. S. 700. The accident would not have occurred but for the defect in the skids, which seems a proximate cause. The principal case seems further unwarranted in drawing a distinction between an unsafe place to work and one in itself dangerous. *Cone* v. *D. L. & W. R. R. Co., supra.* The result might be supported since there appears to have been an assumption of risk; but on its reasoning the decision seems unsupportable.

OFFICERS—PROSPECTIVE RESIGNATION—WITHDRAWAL AFTER ACCEPTANCE.—On February third the respondent, a sheriff, tendered his resignation to take effect April fifteenth, which was accepted by the proper authorities. On February twenty-ninth he wrote withdrawing his resignation. This withdrawal was not accepted, and on April fifteenth the relator was duly elected to office. *Held,* Talbot, C. J., dissenting, the respondent could withdraw his resignation after its acceptance in spite of the refusal of the Board. *State ex rel. Ryan* v. *Murphy* (Nev. 1908) 97 Pac. 391, 720.

To constitute a complete resignation there must be an intention to relinquish accompanied by the act of relinquishment. Mechem, Public Officers § 417. At common law since office was regarded as a burden an acceptance was also necessary to make the resignation effective. *Edwards* v. *United States* (1880) 103 U. S. 471. Since the act of relinquishment is not present, a prospective resignation is merely an expression of intention to resign, *Biddle* v. *Willard* (1857) 10 Ind. 62, which becomes a resignation at the day named, if accepted. *Whitney* v. *Van Buskirk* (1878) 40 N. J. L. 463. An acceptance, however, not only makes a resignation complete, but in the case of a prospective resignation it acts also upon the expression of an intention to resign, making it irrevocable, unless in the absence of new intervening rights, the accepting power consents to a withdrawal. *Biddle* v. *Willard, supra.* This effect upon the intention to resign is due to the independent operation of the acceptance upon the intention, *Whitney* v. *Van Buskirk, supra,* making it irrevocable and thus preventing complications arising from the possible vacillation of the resigning officer. *Murrary* v. *State* (1905) 115 Tenn. 303. A state therefore in denying the common law need of acceptance to complete a resignation, *State* v. *Clark* (1868) 3 Nev. 519; Throop, Public Officers 410, should not be said to deny also the effect of an acceptance once made as establishing the irrevocability of the intention to resign, *Bunting* v. *Willis* (1875) 27 Gratt. 144, since this effect is entirely independent of the necessity of acceptance. The principal case appears unsound, since although consent to withdraw an accepted resignation was denied, the respondent was allowed to continue in office. Authorities apparently *contra* are clearly distinguished in the dissenting opinion.

PARTY WALLS—RECONSTRUCTION OF WALL—LIABILITY TO CONTRIBUTE.—A party wall was injured by a fire. The report does not clearly indicate whether the wall was totally destroyed or merely damaged. The plaintiff reconstructed it and sued the adjoining owner for contribution. *Held,* the action was maintainable. *Howze* v. *Whitehead* (Miss. 1908) 46 So. 401. See NOTES, p. 74.

PLEADING AND PRACTICE—ELECTION BETWEEN CAUSES OF ACTION.—Plaintiff sought to recover in one action on an express contract and a *quantum meruit.* At the close of the evidence, the defendant demanded an election. *Held,* no election necessary. *Model Clothing* v. *Hirsch* (Ind. 1908) 85 N. E. 719.

Many courts under the reformed procedure allow the plaintiff to set out his cause of action in different counts to meet the exigencies of proof and do not require an election before trial. *Leonard* v. *Roberts* (1894) 20 Colo. 88; *American Nat'l Bank* v. *Nat'l Wall Paper Co.* (1896) 77 Fed. Rep. 85; *Ware* v. *Reese* (1877) 59 Ga. 588; *Cowan* v. *Abbott* (1891) 92 Cal. 100. Other jurisdictions would compel the plaintiff to elect on which count he will go to trial, *Ehrlich* v. *Aetna Life Ins. Co.* (1885) 88 Mo. 249; *Fox*

et al. v. *Graves* (1896) 46 Neb. 812; *Gardner* v. *Locke* (N. Y. 1882) 2 Civ. Proc. 252; *Dickins* v. *N. Y. Central Ry.* (N. Y. 1856) 13 How. Pr. 228, allowing however liberal amendments to conform the pleadings to the proof, *Morgan* v. *Mason* (N. Y. 1855) 4 E. D. Smith 636; *Pierson* v. *Switzer* (1898) 98 Wis. 397, or disregarding the variance, if the cause is not substantially changed nor the defendant misled. *Burgess* v. *Helm* (1898) 24 Nev. 242; *Sussdorf* v. *Schmidt* (1873) 55 N. Y. 319. The two counts in the principal case are inconsistent. The existence of one disproving the other, the requiring of an election would seem preferable. *Davis* v. *Tubbs* (1895) 7 S. D. 488. Assuming the rule of allowing different counts to meet the exigencies of proof to be sound, its reason ceases when all the evidence is in. Courts agreeing with the principal case prefer to instruct the jury as to the recovery, submitting to them both counts. *Great Western Coal Co.* v. *Chicago Great Western Ry Co.* (1899) 98 Fed. 274. This seems to defeat the rule aiming at singleness of pleading.

QUASI-CONTRACTS—LIABILITY FOR NECESSARIES.—The plaintiff contracted with the defendant, an infant, to supply him with clothes, and sued upon the contract. *Held,* for the defendant, the plaintiff having failed to show with reference to the infant's actual requirements as well as his station in life that the goods were necessary. *Nash* v. *Inman* (1908) 98 L. T. 658. See Notes p. 72.

SALES—BILLS OF LADING—LIABILITY OF PLEDGEE.—A sold goods to B and drew on him for the price. C discounted the draft with bill of lading attached as security, and collected the same from B. *Held,* C was not liable to B for breach of a warranty in the sale contract. *Mason et al.* v. *Nelson et al.* (N. C. 1908) 62 S. E. 625.

The principal case reverses *Finch* v. *Gregg* (1900) 126 N. C. 176, which followed *Landa* v. *Lattin* (1898) 19 Tex. Civ. App. 246. (reversed in *Blaisdell* v. *Citizens Nat'l Bank* (1903) 96 Tex. 626). The *Finch* case, though much criticised, was followed in a number of other jurisdictions. *Searles Bros.* v. *Smith Grain Co. et al.* (1902) 80 Miss. 688; *Haas & Co.* v. *Citizens Bank* (1905) 144 Ala. 562. The principal case may be sustained on two grounds. First, the transferee of a bill of lading taken merely as security for a draft does not become the absolute owner of the goods with all the liabilities of the seller. He acquires only a qualified interest sufficient to support his claim. *First Nat'l Bank* v. *Crocker* (1872) 111 Mass. 163. Further the acceptance and payment of the draft discharges the holder from all equities existing between consignee and seller. *Hoffman & Co.* v. *Bank of Milwaukee* (1870) 12 Wall. 181. This rule works no injury to the purchaser for he still has his action on the warranty against the seller. *Schreiber* v. *Andrews* (1900) 101 Fed. 763. The principal case is in accordance with sound policy, and is chiefly interesting as correcting the law of North Carolina in accordance with the weight of authority. *Leonhardt* v. *Small* (1906) 117 Tenn. 153; *Tolerton* v. *Stetson Co.* (1901) 112 Ia. 706; *Hall* v. *Keller* (1902) 64 Kan. 211.

SPECIFIC PERFORMANCE—HARDSHIP—INADEQUACY OF CONSIDERATION.—The defendant resisted enforcement of a contract to sell all the phosphate under her land to the plaintiff, on the ground of his discovery of a quantity worth three times the purchase price. *Held,* specific performance should be granted. *Bradley* v. *Heyward* (1908) 164 Fed. 107. See Notes p. 68.

SUBROGATION—VOLUNTEERS—LIMITATIONS UPON THE RIGHT.—The plaintiff accepted and paid a check, the signature of the maker of which was forged. The payee, the City of New York, applied it, at the forger's direction, for his own purposes and without the defendant's knowledge, to discharge a lien against land which the defendant had already contracted to sell unencumbered, and which he shortly afterwards so conveyed, receiving the purchase price in full. The plaintiff sought recoupment on the theory of a

right to be subrogated to the city's original claim. *Held,* recovery denied. *Title Guaranty & Trust Co.* v. *Haven* (1908) 111 N. Y. Supp. 309. See Notes p. 63.

TAXATION—WATER-POWER—SITUS.—A corporation, in connection with its factory in Rhode Island, used water power created on property situate in Massachusetts. *Held,* the water-power was taxable as an element of the value of the Massachusetts property and, though utilized in Rhode Island, that use could be considered in determining the assessment. *Blackstone Mfg. Co.* v. *Blackstone* (Mass. 1908) 85 N. E. 880.

A tax upon riparian property includes the incidental right to use the water in a stream, and this incidental right cannot be separated and made the subject of an independent tax. *State* v. *St. Paul etc. R. R.* (1900) 81 Minn. 422. The Massachusetts courts, construing the Mill Act as making the riparian owner's right a mere potentiality, have previously held that the water power has its situs for purposes of taxation at the place where it is applied. *Boston Mfg. Co.* v. *Newton* (1839) 22 Pick. 22. It is suggested the statute had no such effect and only regulated the exercise of equal rights. *Head* v. *Amoskeag Mfg. Co.* (1885) 113 U. S. 9. The rule of the principal case, that the water power should be taxed with the land to which it is incident, and that it cannot be made appurtenant to other land by its application, has received general approval. *Quinbaugh Reservoir Co.* v. *Union* (1900) 73 Conn. 294; *Amoskeag* v. *Conklin* (1891) 66 N. H. 562. *Water Power Co.* v. *Auburn* (1897) 90 Me. 60 apparently *contra* was decided on grounds of policy and has been materially weakened by *Water Power Co.* v. *Buxton* (1903) 98 Me. 395. That the land where the power is used may also be assessed on an increased valuation because of the use of the water-power does not militate against this rule. *Water Power Co.* v. *Auburn, supra,* see dissenting opinion. The principal case holding that the Mill Act can have no extra-territorial effect does not reverse *Boston Mfg. Co.* v. *Newton, supra,* but in distinguishing it, corrects its misleading effect—see for example Farnham, Waters 1501. In determining the value of the water-power for purposes of taxation in Massachusetts, the value of property extending in two states may be apportioned in taxing the property in one. *Cleveland Ry. Co.* v. *Backus* (1893) 154 U. S. 439; *Pa.* v. *Trenton Bridge* (Pa. 1861) 9 Am. L. Reg. 298.

TORTS—MALICIOUS PROSECUTION—RIGHT OF A BANKRUPT CORPORATION TO SUE.—A bankrupt corporation sued for malicious prosecution. *Held,* action was one for injury to property and did not survive to the corporation, after the appointment of a trustee. *Hansen Mercantile Co.* v. *Whyman, Partridge & Co.* (Minn 1908) 117 N. W. 926.

Malicious prosecution is a purely personal tort, Buller Nisi Prius 3; Holland, Jurisprudence (9th Ed.) 177, originally regarded as an aggravated form of defamation. 2 Pol. & Mait., History of English Law (2nd Ed.) 539; 3 Bl. Com. 126. The personal injury is the gravamen of the action. *Noonan* v. *Orton* (1874) 34 Wis. 259. The action being personal is not assignable, *Lawrence* v. *Martin* (1863) 22 Cal. 174; *Slauson* v. *Schwabacher* (1892) 4 Wash. 783, and does not pass to the trustee in bankruptcy. *In re Haensell* (1899) 91 Fed. 355; *Noonan* v. *Orton, supra.* In allowing recovery by a corporation for so-called personal torts, the courts have usually required proof of special damage to property. *Trenton etc. Co.* v. *Perrine* (N J. 1852) 3 Zab. 402; *Shoe & Leather Bank* v. *Thompson* (N. Y. 1865) 18 Abb. Pr. 413. But this is not imperative, *Quartz Hill etc. Co.* v. *Eyre* (1883) 11 Q. B. D. 674; *Knickerbocker etc. Co.* v. *Ecclesine* (N. Y. 1869) 6 Abb. Pr. n. s. 9, 27, nor does it change the character of the action for malicious prosecution. Proof of damage is essential to this action, and injury to property is merely one of the recognized forms of damage that may always be shown. *Savill* v. *Roberts* (1698) 12 Mod. 208. Except possibly under the special statute involved, (Minnesota Revised Laws 1905, § 4502), the principal case, while perhaps in accord with the spirit of the Bankruptcy Act, is hardly sustained by the decisions.

TRUSTS—EXPRESS TRUSTEES—STATUTES OF LIMITATION.—The defendant's testator, the trustee of a secret trust, committed breaches thereof without the knowledge of the plaintiff, the *cestui.* The defendant set up the statute of limitation. *Held,* since there was an express trust and the *cestui* had no knowledge of the breach, the defense failed. *Russell* v. *Huntington Nat. Bank* (1908) 162 Fed. 686.

The principal case accords with the rule laid down by American courts and text writers that until there has been to the knowledge of the *cestui* such a breach as amounts to a repudiation the Statute of Limitations does not act as a bar. Perry, Trusts § 863. This view is based upon the ground that the trustee is holding adversely and from then on the statute begins to run. *Kane* v. *Bloodgood* (1823) 7 Johns. Ch. 90; *Hill* v. *McDonald* (1890) 58 Hun 322. The English cases generally cited to support this proposition seem misconstrued. *Wedderburn* v. *Wedderburn* (1838) 4 M. & C. 41, 52; *Pollock* v. *Gardner* (1842) 1 Hare 594; *Lister* v. *Pickford* (1864) 34 L. J. Ch. 582. They clearly hold the Statute of Limitations inapplicable to express trusts, *Att'y Gen'l* v. *The Fish Monger* (1841) 5 M. & C. 16, and seem to regard the time of repudiation as important only in determining whether *laches* will be imputed. Further, in imputing *laches* the English courts are more zealous of the *cestui's* interest than American courts. Thus they have held that the above rule applies, though the trust is established by parol evidence; *Rochefoucauld* v. *Boustead* [1897] 1 Ch. 196; and that an agent having a fiduciary relation to his principal, [*Burdick* v. *Garrick* (1870) L. R. 5 Ch. App. 232], one who assumes to act as a trustee, [*Life Ins.* v. *Siddal* (1861) 3 D. F. & G. 58], or one who obtains the trust *res* by collusion in the fraud of the trustee, [*Soar* v. *Ashwell* L. R. (1893) 2 Q. B. 390], will be looked upon as an express trustee. It would seem that the American courts following their less liberal policy would oppose such extensions of the liabilities of an express trustee. *Lammer* v. *Stoddard* (1886) 103 N. Y. 762; *McClane's Adm.* v. *Shepherd's Ex.* (1870) 21 N. J. Eq. 76; note 7 L. R. A. 370.

TRUSTS—INVESTMENT OF TRUST FUNDS.—A *cestui* sued to recover trust funds lost through investment in the bonds of a loan company of another state. *Held,* that the trustee was justified in investing without the state and in relying on the general good reputation of the securities. *Scoville* v. *Brock* (Vt. 1908) 70 Atl. 1014.

The rule as to investment of trust funds varies. Generally investments are restricted to public securities or mortgages on unencumbered real estate. *King* v. *Talbot* (1869) 40 N. Y. 76; *Simmons* v. *Oliver* (1889) 74 Wis. 633. Some courts protect the trustee provided he has acted as a prudent man would have done in making a permanent investment, *Hunt, Appellant* (1886) 141 Mass. 515; *Mattocks* v. *Moulton* (1892) 84 Me. 545, while a few others justify the trustee if he has acted in good faith. *McCoy* v. *Horowitz* (1884) 62 Md. 183. Under the last two rules investments in private corporations are approved if the business is well established and has acquired a sound reputation. *Smyth* v. *Burns* (1853) 25 Miss. 422; *Dickinson's Appellant* (1890) 152 Mass. 184. Though there is no fixed rule against investing without the state, such investments have been held justifiable only in cases of "pressing emergency." *Ormiston* v. *Olcott* (1881) 84 N. Y. 339; *McCullough* v. *McCullough* (1888) 44 N. J. Eq. 313. In the principal case no such emergency appears, but the court's leniency is typical of a jurisdiction which has gone so far as to hold an investment in a promissory note permissible. *Barney* v. *Parsons* (1882) 54 Vt. 623.